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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
and
BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS
and
BROTHERHOOD OF RAILROAD TRAINMEN AS AMICI CURIAE ON REARGUMENT.

RAY T. MILLER,
WAYLAND K. SULLIVAN,
HAROLD N. MCLAUGHLIN,
1708 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen, Amici Curiae.

ONALD W. HORNBECK,
. A. ENDLE,
Of Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned, Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen, by their attorneys, hereby move the Court for leave to file a brief as *amici curiae* in the above entitled action, and represent to the Court as follows:

Said Brotherhoods are associations whose membership, respectively, comprises the large majority of employees of the principal railroads of the United States who are employed as locomotive engineers and as trainmen, switchmen and train baggagemen. The respective General Committees of said Brotherhoods have collective bargaining contracts with substantially all of the principal railroads of the United States concerning rates of pay, rules and working conditions of said classes of employees.

The issues in this case are concerned with the right of the collective bargaining representatives to settle grievances of employees covered by said collective agreements, and are of great interest and importance to said Brotherhoods in the representation of said classes of employees. The right to proceed in the disposition of cases now pending

before the National Railroad Adjustment Board in whi
General Committees of said Brotherhoods appear as repr
sentatives of the employees concerned will be determine
by the decision to be rendered in this case.

Said Brotherhoods are not members of, or represente
by, any of the associations or organizations on behalf
which briefs *amici curiae* have been filed herein.

Said Brotherhoods have obtained the consent of th
petitioner to the filing of a brief *amici curiae* herein b
the respondents have declined to give their consent
the filing of such brief. Manuscript copies of this bri
have been furnished to the parties.

Dated at Cleveland, Ohio, this 29th day of Novembe
1945.

RAY T. MILLER,
WAYLAND K. SULLIVAN,
HAROLD N. MCLAUGHLIN,
1708 Union Commerce Building,
Cleveland 14, Ohio,
*Attorneys for Brotherhood of Locomoti
Engineers and Brotherhood of Railroa
Trainmen, Amici Curiae.*

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BRIEF FOR THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF RAILROAD TRAINMEN AS AMICI CURIAE ON REARGUMENT.

STATEMENT.

The facts are sufficiently set forth in the Court's opinion heretofore rendered herein.

This brief is submitted by the Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen, as *amici curiae,* to bring to the attention of the Court certain considerations deemed to be important in the decision of this case. These Brotherhoods and their members obviously are greatly interested in the effect of the decision upon the functioning of the Railway Labor Act. The views herein set forth are intended to supplement those of the parties and other *amici curiae* in presenting a full understanding of the issues before the Court.

Statement of Position of the Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen.

It is the position of the Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen that, under the Railway Labor Act, the duly designated representative of a craft or class of employees has authority to settle with a carrier disputes between individual members of such craft or class and the carrier growing out of the interpretation or application of the collective agreement and to submit such disputes to the National Railroad Adjustment Board without proof of specific authority from such employees so to do.

ARGUMENT.

1. The nature of grievance disputes and the problem presented.

In Part I of the Court's opinion the differences are discussed between disputes over grievances and those concerning the making of collective agreements. These differences and differences in the statutory treatment of the two types of disputes exist, but we think they are not controlling upon the issues here presented. Before considering their significance and effect, however, we believe it appropriate to draw the Court's attention to the type of "grievances" which are involved here. In general, they are disputes which are referable to the National Railroad Adjustment Board. One of the sponsors of the 1934 amendments to the Railway Labor Act defined such disputes as including those over seniority, amount of pay for the class of work performed, separation from service, unjust dismissal, promotion, reduction in force or recall in seniority order, and many other similar matters.[1] Specifically, the "grievances"

[1] See testimony at Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., pp. 80-81, and Hearings before Senate Committee on Inter-

(Continued on following page)

here at issue involve the interpretation and application of a collective agreement rule, to wit, Article 6 of the agreement between the Brotherhood and the carrier. They are of the class defined in § 2, General Purposes, (5), and § 3, First, (i), as "disputes * * * growing out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The settlement of this type of dispute, as we shall show, is among the most important features of the statutory plan[1] because of its close relation to the "making and maintaining" of craft agreements and to peaceful relations between men and management.

(a) The volume of the grievance load.

As of June 30, 1944, there were on file with the National Mediation Board 4428 railroad collective agreements covering some twenty crafts or classes of employees.[2] The Board in its First Annual Report emphasized the significance of the agreements and their importance as follows:[3]

"The absence of strikes in the railroad industry, particularly during the last 2 years when wide-spread

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(Continued from preceding page)

state Commerce on S. 3266, 73rd Cong., 2nd Sess., p. 34. See also table of cases decided by the First Division of the National Railroad Adjustment Board "classified as to subject matter," appearing in the First Annual Report of the National Mediation Board, p. 50, as further illustrating the type of disputes referable to the Board.

[1] In reporting out the 1934 amendments the House Committee stated:

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances,' *which develop from the interpretation and/or application of the contracts between the labor unions and carriers fixing wages and working conditions.*" (Emphasis supplied.) H. Rep. No. 1944, 73rd Cong., 2nd Sess., p. 2.

[2] Tenth Annual Report of the National Mediation Board, pp. 38-40. Agreements for express, Pullman, miscellaneous and airline carriers are excluded in the above count.

[3] First Annual Report of the National Mediation Board, p. 36.

strikes, the usual accompaniment of business recovery, prevailed throughout the country, is to be explained primarily not by the mediation machinery of the Railway Labor Act, but by the existence of these collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all labor disputes as a substitute for strikes and industrial warfare. *Theoretically all disputes are settled by the collective agreements, but of course many differences of opinion arise as to the meaning and application of the agreements.* * * *" (Emphasis supplied.)

Actually disputes over the meaning and application of agreements arise with great frequency and constitute one of the most serious of labor problems on the railroads. A first indication of the extent of the grievance load may be gained from noticing the total of cases lodged with the National Railroad Adjustment Board. As of June 30, 1944, there were pending before the Board 6133 cases, of which 5873 were before the First Division. New cases were being docketed at the rate of 2467 per year.[1] It will be borne in mind that the Board cases are drawn from the unsettled residue of those arising on the various railroad properties.

As a further indication of volume, examination of the annual statistics of the Brotherhood of Railroad Trainmen is illuminating. For the year ending June 30, 1944, the Adjustment Board reported that the B. of R. T. filed 979 cases before Division 1.[2] The Report of the president of the B. of R. T. for the year 1944 discloses that during this year the organization's vice presidents and deputy presidents, in assisting B. R. T. general committees, handled 3951 grievance cases with railroad managements. The claims in such cases were disposed of as follows: allowed

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[1] Tenth Annual Report of the National Mediation Board, Table 15, p. 41.

[2] Tenth Annual Report of the National Mediation Board, p. 52.

or compromised 2416; withdrawn 541; referred to National Railroad Adjustment Board 113; to be handled further on the property 881.[1] These statistics show that the 113 cases thus referred to the Adjustment Board are less than 3 percent of the total handled by the grand officers. If this ratio be applied to the 979 B. R. T. cases filed with the Board during the year ending June 30, 1944—which include the number filed without grand officer assistance—it would appear that the Brotherhood's general committees handled some 38,000 grievances on the properties in one year for this single organization. The figure reaches its true significance when the volume of grievances dealt with at local levels is considered. General committees prosecute only the unadjusted grievances referred to and accepted by them when local committee action fails. It is estimated that no more than 5 to 10 percent of the grievances handled by local committees ever reach the general committees. While these estimates are not precise, enough has been said to indicate the great magnitude of such grievances.

(b) The necessity of settlement or adjudication with the aid of representatives.

Of particular interest in the case at bar are the data respecting settlements made on the property. It will be observed that 2957 or 75 percent of the 3951 grievances handled by B. R. T. grand officers, as aforementioned, were closed out on the properties. They correspond in position to the settlement made in the instant case, i.e., they were negotiated at the highest level of management after local

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[1] This Report is on file in the Library of Congress. Copies will be furnished to the Court and counsel. The data here stated are from an analysis of the reports of the above named officers shown at pp. 80-250 of this volume.

efforts had failed. And they included compromise settlements.[1]

It is demonstrably clear that "on the property" settlements are essential in the disposition of grievance cases of the type under consideration here. Coordinator Eastman, at the hearings on the 1934 amendments, referred to the necessity of the organizations and the railroads "settling all disputes that they can at home" to prevent flooding the Adjustment Board with cases.[2] In 1936 the Mediation Board expressed its thought that the compulsory adjudication of disputes by the Adjustment Board "is rapidly bringing about the change in labor relations in the industry

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[1] See, as an example, "Chicago, Burlington & Quincy R. R. (File 4476)—Interchange of cars, and time claims.

On March 27, 1944, Deputy President J. A. Rash (326) assisted our committee in handling with the management claim of three senior unassigned extra yardmen (foreman and two helpers), Chicago Yard, for a minimum day's pay at basic yard rates on certain days when (1) B&OCT, (2) CMStP&P, (3) Illinois Northern, (4) IHB, and (5) CR&I crews are used to perform transfer movement of cars originating on the Burlington. Understanding was reached that the present practice of interchanging cars with the B&OCT, IHB and CR&I Railroads at Western Avenue yard will continue for the duration of the war and for a period not to exceed 90 days thereafter. Within 90 days following the cessation of hostilities the management and committee will confer and agree upon a mutually satisfactory arrangement whereby CB&Q yardmen will make deliveries of cars assembled at Western Avenue for interchange with the B&OCT, IHB and CR&I Railroads, either direct or through some intermediate line, or agree upon some other mutually satisfactory arrangement that will give to CB&Q yardmen their share of the work made a basis of dispute in claims Nos. 1, 4 and 5. The practice of CMStP&P and Illinois Northern crews taking cars from Western Avenue Yard, which is the basis of dispute in claims Nos. 2 and 3, was discontinued February 8, 1943. In view of the mutual understanding as expressed in the foregoing, all claims growing out of disputes described in claims Nos. 1, 2, 4 and 5 were withdrawn, and in claim No. 3 a compromise agreement was reached governing the manner of payment to the yard crew or members thereof when available but performed no service during the period September 4, 1942, to February 8, 1943." (Report of the President B.R.T., 1944, p. 6A-89.)

[2] Hearings before House Committee on H. R. 7650, 73rd Cong., 2nd Sess., p. 48.

which it was hoped the law would accomplish, viz., an increasing tendency to *settle controversies on the properties where they arise* without any recourse to legal procedure.[1] (Emphasis supplied.) However, in practice the number of unadjusted cases brought to the Board continued to mount until it reached serious proportions. The problem was considered by the Attorney General's Committee on Administrative Procedure[2] and has been the subject of repeated conferences between Brotherhood and carrier representatives and officials of the Government. On February 13, 1945, President Roosevelt delegated Mr. Edward J. Connors, an official of the Union Pacific Railroad, to make an analysis and report of the 5000 undecided cases pending before the First Division of the Adjustment Board and to give his recommendations for "(a) Settlement or disposition of such disputes; (b) Reduction in the number of controversies submitted to the First Division and improvement in methods and procedure for the more expeditious handling of cases." Although, so far as we are aware, Mr. Connors' report to the President has not yet been made or released, we may advise the Court of certain results that have recently been achieved toward clearing the Board's docket. Under date of October 11, 1945, Mr. Connors reported to the chief executives of the five engine and train service Brotherhoods that there were 3674 cases pending before the First Division, a net reduction of 1438 cases since his assignment was undertaken, this reduction representing the withdrawal or decision of 2298 cases minus 860 new cases filed during the period. He also advised that 5000 additional cases in prospect of submission to the Division had been disposed of. While this record is encouraging, it appears, as pointed out by Mr. Connors, that "the ultimate solution of this problem must be met in the improve-

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[1] Second Annual Report, p. 34.

[2] Report of the Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 188.

ment in the settlement effort or clarification of rules on those railroads on which an excessive number of cases are submitted." Such a solution, we submit, can be achieved only by collective action by employee and carrier representatives.[1]

The practical necessity of collective bargaining in the adjustment of grievances is apparent from the nature, scope and extent of the grievances themselves and the techniques employed in their settlement. The wide scope and complexity of railroad collective agreements are well known to students of labor relations.[2] This Court has had access to

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[1] The technique used on many roads in reducing the number of Board cases was that the respective Brotherhoods and the carrier appointed joint reviewing committees which analyzed the cases, and then disposed of them in groups by payment, compromise or withdrawal on the basis of precedents or agreed to principles.

[2] "The content of the agreement embraces the whole field of labor relations in great detail. One of the larger carriers, for example (the Baltimore and Ohio Railroad with a mileage of approximately 6,400), has 53 written trade agreements with the standard railway unions. The agreements average about 5,000 words in length. * * * An indication of the detail and complexity found in railway agreements is the following array of subject matter contained in a trainmen's agreement: (1) Detailed subdivisions relating to remuneration—rates of pay, guarantees of daily earnings, rates of pay on freight service, on local service, to starting points, from point of assignment, for dead-heading, for learning road, for extra work, for run-around, and for freight turn-around service; (2) detailed subdivisions relating to other conditions—basic working day, guarantees of work, seniority, seniority rosters, grievances, work not required of trainmen, transportation of goods, physical examination, employment of injured employees, and lunch periods. * * * The agreements for the conductors, engineers, firemen, trainmen, and clerks give about one-third of their space to describe the functioning of the general rules. The firemen's agreement, for example, contains 153 items covering 70 pages. Of these, 28 items deal with wages, 29 with the working day, 39 with seniority, 29 with grievances and protection against discrimination, and 28 with working conditions.

An illustration of how the interpretative material grows is given in the seniority rule of the railway clerks. In the 1909

(Continued on following page)

typical agreements for engineers and firemen in *General Grievance Committee etc. v. Southern Pacific Co.* (Nos. 27 and 41, October Term 1943), 320 U. S. 338. The variety of claims arising under such agreements is exhibited in the classification of cases according to subject matter made by the First Division of the Adjustment Board in its first annual report, to which we have referred. One hundred eight separate types of cases were so listed in the cases decided in one year.[1]

As pointed out by *amici* counsel, grievances of the type under discussion often involve large numbers of individuals in complex situations.[2] We cite some additional illustrations. There are the so-called "blanket" cases where a grievance is handled for one man or crew but its disposition governs others similarly situated. Thus, in an engineer's case the claim was stated as follows:[3]

(Continued from preceding page)

agreement it read: 'In all cases of promotion or making reduction in force, other things being equal, the clerk longest in the service will be given the preference, the superintendent's decision to be final.' By 1927 this rule had expanded to cover approximately six pages of the agreement.

By modification and interpretation, a general term of the agreement is expanded to relate to the whole employment situation, and at the same time it is clarified so as to cover all possible grievances which might arise under it. The same processes are observed in the agreements of other unions. The conductors clarify a section dealing with 'extra work'; the firemen and engineers give 15 pages of examples for the functioning of their wage schedule; the engineers clear up difficult problems by the 'question and answer' method; the signalmen give a mathematical interpretation of the term 'monthly rate'; and the maintenance-of-way employees provide detailed rules for seniority rosters at each subdepartment." *Written Trade Agreements in Collective Bargaining*—N. L. R. B., Division of Economic Research, Bulletin No. 4, pp. 119-122.

[1] First Annual Report of the National Mediation Board, Table III, p. 49.

[2] See also Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, 46 Yale L. J. 567, 586.

[3] Award No. 7594, Docket No. 10401, National Railroad Adjustment Board, First Division (Brotherhood of Locomotive Engineers—Great Northern Railway).

"(1) Claim of Engineer I. Ellis * * *, who was first out in the engineers' extra board, for time lost plus deadheading * * * account locomotive crane X1795 working * * * without locomotive engineer handling the locomotion of this machine, which was performed by a maintenance of way employee; claim also covers all other extra engineers on the different extra boards on the system, who were * * * first out on their respective extra boards when such road machinery was used. Claim is also made for 100 miles for all other engineers on the various extra boards because of not being advanced on their respective extra boards due to the first extra engineer being denied this service."

"(2) Claims of engineers for time lost plus deadheading, if any, who were first out on extra board and entitled to this work" when self-propelled machines or cranes were used [in other instances specified].

The claim was based upon a rule in the engineers' agreement providing in substance that whenever electric or other power is installed as a substitute for steam, locomotive engineers shall have preference for positions as engineers or motormen. The claim was sustained.

The application of this award involved the ascertainment of the identity of the engineers who were on the extra lists on the dates when, and at the places where, the locomotive cranes were used; which engineers were available under the "first in first out" rule; from what sources men would be drawn, and who should be called when there was no extra list or said list was exhausted; at what points deadheading would be required, and the deadheading time involved for each such man; and the applicable rate of pay —all covering a period of several years.

We think the Court will be interested in the ultimate disposition of such claims. There appears to be no public source of information as to the number or identity of the claimants in cases such as the foregoing one, or the amount of money involved. We may inform the Court, however, that records in the offices of the Brotherhood of Locomotive

Engineers disclose that in this case claims were paid to 1001 engineers amounting to $1,093,487.36. These records also show that in the settlement of said claims an agreement was made between the Brotherhood's General Committee of Adjustment and the carrier providing a formula for the ascertainment of the claims and also clarifying the rules concerning the manning of self-propelled machines. This agreement in the latter respect was like that made in the case at bar, which included settlement of the question of the application of the starting time rule. In practice it thus appears that the settlement of claims and the future application of the rules are often intertwined.

Other examples serving to illustrate various types of grievance disputes and their ramifications are set forth below.[1] In addition there is reprinted in Appendix 1 here-

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[1] In Award No. 1763, Docket No. 3241, National Railroad Adjustment Board, First Division (O.R.C. and B.R.T.—Lehigh Valley RR.), the claim was made for all passenger conductors, baggagemen, trainmen and flagmen for one extra yard day for being required to "yard" their trains at the completion of their trip, which work was claimed to be regular yard work belonging to yardmen and not to be performed by road passenger men under the collective agreement rules. The claim was allowed. We inform the Court, from information in the B.R.T. files, that the settlement in this case involved 267 men who received $263,613.39.

Award No. 5196, Docket 6877, N.R.A.B., First Div. (B.R.T. —Central R. R. of New Jersey) involved the reinstatement of all head-end passenger trainmen or baggagemen who had been removed from certain assignments, with compensation for the difference of their earnings in their present and former assignments; and also claimed such difference in earnings for all other passenger trainmen who were displaced under seniority rules to other positions by those who had been removed. The claim was sustained, and the report of a B.R.T. officer shows that it was included in a settlement involving awards under which the train service employees will receive several hundred thousand dollars. (Report of the President, Brotherhood of Railroad Trainmen 1944, *supra*, p. 6A-88.) The fact that this claim had to be handled by the Brotherhood before payment could be obtained is also significant. As in many other cases, the parties had to reach agreement by the process of collective bargaining before the claims actually were approved for payment.

(Continued on next page)

to Award No. 9231 of the First Division of the Adjustment Board which, in the findings of the Referee, contains an illuminating discussion of the practice concerning multiple claims on behalf of unnamed individuals.

As an example of grievance adjustments made "on the property" which involve many persons, the following settlement is summarized in the report of the President, Brotherhood of Railroad Trainmen 1944, *supra*, at p. 6A-130:

(Continued from preceding page)

In Awards Nos. 5141, 5142, 5144, and 5145, N.R.A.B., First Div., the statements of claim read:

"Claim of Engineer J. L. Nau and Fireman I. Fladness, of the Casper Division, for 2 hours and 30 minutes switching at Greybull, February 25, 1938. Also claim for Engineer and Fireman first out on the extra board on this and all subsequent dates when road crews performed switching covered in Rule 22 of the Engineers' and Firemen's schedules." (Award No. 5141, Docket No. 9396.)

"Claim of Engineer H. A. Gibson and Fireman E. L. Miller, Casper Division, for eight hours at yard rates account of performing station switching July 14, 1938, in addition to making up their own train in Greybull Yard. Claim is also filed for Engineer and Fireman first out on the extra list on this and all subsequent dates when road crews are used to perform eight hours or less switching for which they are available under Rule 22 of Engineers' and Firemen's schedule." (Award No. 5142, Docket No. 9397.)

"Claim of Engineer W. C. Roberts and Fireman J. W. Houlihan, Casper Division, for eight hours at yard rates account of being required to switch baggage cars on the head end of No. 30 before departing from Casper, December 18, 1936. Claim is also made for Engineer and Fireman first out on the extra list on this and all subsequent dates when road crews are used to perform eight hours or less extra switching." (Award No. 5144, Docket No. 9399.)

"Claim of Engineer W. C. Roberts and Fireman J. W. Sturm, Casper Division, for a day's pay at yard rates on account of performing yard service in Casper September 22, 1936, upon their arrival on passenger train No. 31. Claim also filed for Engineer and Fireman first out on the extra list on this and all subsequent dates when road crews are used to perform eight hours or less switching." (Award No. 5145, Docket No. 9400.)

"Pittsburgh & Lake Erie R. R. (Files 7697 and 6002-221)—Docket of miscellaneous cases, and revision of schedule covering road and yard men.

Deputy President W. E. B. Chase (636) was assigned on August 29, 1944, to assist our committee in prosecuting with the management a docket of 77 miscellaneous cases. Numerous conferences were held commencing September 12, and Brother Chase reported on November 14 that all cases were disposed of, as follows: 59 cases were allowed, one of which involved the payment of approximately 7,000 time claims and seven others involved the payment of an additional yard day to some 3,000 crews [9,000 or more men] amounting to approximately $70,000. Seventeen cases were withdrawn which were unsupported by rule. New rules were agreed upon covering some of the points in dispute. One case was declined and will be submitted to the National Railroad Adjustment Board, First Division, for determination. A revision of the schedule covering road and yard men was also negotiated, effective December 1, 1944. Several thousands of dollars will accrue to road crews as result of the re-establishment of two divisions, and trainmen operating between Pittsburgh-Cleveland and Pittsburgh-Ashtabula will benefit approximately $300 per month on account of being placed on a straight-away basis. In the revision, all former standard and other favorable rules were retained, and thirty new rules and eighteen new clauses were added, which will prove beneficial to all the employees on the property."

The process of adjustment of grievances requires specialized knowledge, skill and training not possessed by individuals. The claims are written up and briefed. It is common to cite numerous precedents in support, including settlements of analogous prior claims, agreed to interpretations, agreements supplementing the printed collective agreement often evidenced by correspondence, arbitration awards, mediation agreements, orders of the Railroad Administration and the United States Labor Board, and decisions of the former regional Train Service Boards

of Adjustment and of the present National Railroad Adjustment Board.[1]

The carriers generally maintain personnel departments staffed with men expert in such matters and assisted by legal counsel. It is the experience of the Brotherhoods that while in the early days local superintendents, general superintendents and general managers usually dealt with committees in the handling of grievances, now such cases find their way to the personnel department where they are given highly technical construction and treatment. The organizations in turn are required to develop men of experience and skill to serve on grievance committees. Thus, there are local grievance committees for each local lodge of a Brotherhood on a given railroad. These committees are headed by a "local chairman" who remains in active service. A General Grievance Commitee or General Committee of Adjustment is maintained by each organization on the road, comprised of the local chairmen. The chairman of the General Committee, called the General Chairman, on the principal roads devotes his full time to the committee's work, maintains an office, and keeps the necessary records and files. As heretofore indicated, there is available to such General Committees the assistance of grand officers from the national offices of the Brotherhood.

Thus staffed and equipped the representatives of the employees and railroad carry on the intricate day to day business of adjusting grievances. It is inconceivable that individuals could perform this function. Indeed, they do not attempt to do so with any frequency, at least above the local level. Instead, there has grown up through the years under statutory influence and command a clear pattern for

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[1] In Award No. 5196, *supra*, the Brotherhood cited five cases of the United States Labor Board, one General Order of the Railroad Administration, and four Adjustment Board decisions in support of its claim. See also Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, *supra* p. 581.

the handling of grievances in the railroad industry known as the "usual manner of handling" by representatives of employers and employees.

2. The "usual manner of handling" grievances, and the long established method of submitting them to Adjustment Boards.

The engine and train service Brotherhoods have had long experience with collective agreements.[1] The process of handling grievances arising under these agreements prior to World War I was described by Walker D. Hines, Director General of Railroads in 1919 and 1920, as follows:[2]

> "Generally, speaking, under private control of railroads, if a labor union had an agreement with a railroad management defining rules and working conditions, provision was made for appeal by an employee from any disciplinary action taken by a local official. As a rule in any such appeal the employee would be represented by the appropriate officer of his union. The appeal could be carried, if necessary, to the chief executive or chief operating officer of the railroad company. If he was unwilling to modify the action of the local official it resulted that the employee and his union had to acquiesce in this action unless a strike was called and a better adjustment was thereby obtained. • • •
>
> Controversies relating to the meaning and application of agreements prescribing rules and working

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[1] Among the oldest of American labor unions now in existence are the Brotherhood of Locomotive Engineers (1863); Order of Railway Conductors (1868); Brotherhood of Locomotive Firemen & Enginemen (1873); and the Brotherhood of Railroad Trainmen (1883). In 1873 the locomotive engineers had a written agreement with the Pennsylvania Railroad, and the Brotherhoods named each had written agreements dating back to the 1880's and 1890's. While these early agreements were brief, they provided for union recognition, seniority and promotion, and specified wage rates and hours of work. *Written Trade Agreements in Collective Bargaining*, N.L.R.B., *supra*, pp. 115, *et seq.*

[2] *War History of American Railroads*, by Walker D. Hines, p. 155.

conditions were subject to settlement in a manner similar to that above outlined as to disciplinary matters in cases where there were working agreements in unions.

When the Government took control of the railroads, the question arose as to whether all such controversies should continue subject to the final decision of the chief operating officer on the particular railroad. General Order No. 8 [of the Railroad Administration] provided: 'Matters of controversy arising under interpretations of existing wage agreements and other matters not relating to wages and hours will take their *usual course*, and in the event of inability to reach a settlement will be referred to the Director General.'" (Emphasis supplied.)

To provide a review of a chief operating officer's decision certain Boards of Adjustment (together with a procedure for unorganized employees) were established by the Railroad Administration. The texts of the orders promulgating these Boards are set forth and discussed at pp. 4 to 8 of the brief of counsel for the Railway Labor Executives' Association filed herein and need not be repeated here. However, it will be recalled that the agreements under which Boards Nos. 1, 2 and 3 were established provided that grievances or controversies arising under interpretation of wage agreements "will be handled in their usual manner by general committees of employees up to and including the chief operating officer of the railroad," when, if an agreement is not reached, after further handling by the chairman of the general committee of employees and the chief executive officer of the organization concerned, the case might be lodged by the latter and the carrier's officer with the appropriate board. It was further provided that no matter would be considered by such board unless referred to it in the manner prescribed, and that in hearings before the board the employees should be represented by a person designated by the chief executive officer of the organization concerned. Thus, on railroads where agreements were in effect, it was recognized with govern-

ment approval that the "usual" manner of handling grievances was by "committees of employees."

Mr. Hines commented:[1]

> "* * * In practice [before these Boards] each Board handled controversies for all its classes of labor on all the railroads under federal control, because even if on a particular railroad there was no agreement between the management and a union representing the particular class of employees, nevertheless any unsettled controversy could be presented by the appropriate national union representative to the Railroad Administration's Division of Labor, whereupon the appropriate Board of Adjustment would be asked for its recommendation, and this would generally be adopted * * *."

He continued:

> "Between 5000 and 6000 cases were dealt with during Federal control by these three Boards * * *. Only ten cases had to be carried to the Director General for decision."

The practice was continued in substantially the same form under the Transportation Act of 1920. Regional Train Service Boards of Adjustment covering the four "operating" crafts were established under § 302 of the Act by agreements between the carriers and the four train service Brotherhoods. These agreements again recognized, and required as a condition precedent to submission to the Boards, the exhaustion of conferences between the *representatives* of the respective railroads and their employees, and again referred to handling in the usual manner by general committees of the employees.[2] Section 303 provided that, in so far as employee invocation was concerned, cases should be heard and decided by such Boards only upon application of the chief executive officers of organizations of employees

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[1] *War History of American Railroads*, p. 157.

[2] See *"Compilation"* handed to the Court in *Washington Terminal Co. v. Boswell* (No. 28, October Term, 1942), pink sheets, pp. 40, 44, 51.

or upon written petition of 100 unorganized employees.[1] The latter method was incorporated in the agreements but was conditioned by the proviso that "no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees parties thereto shall be considered as a dispute under this agreement." This proviso prevented unorganized employees from seeking a decision which would place an interpretation upon the craft rules which had been collectively negotiated.

We add that whatever may be said respecting the intention of the Labor Board in Decision 119[2] to recognize the right of individuals to "present" grievances in person, it appears that they were not entitled individually to present a case to an adjustment board or to the Labor Board itself.

The Railway Labor Act of 1926 carried forward the concept of handling grievances in the "usual manner." The language quoted appeared in § 3 First (c) which provided that the agreements creating boards of adjustment should provide that disputes

> "growing out of grievances or out of the interpretation or application of agreements * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party. * * *."

The practical interpretation placed upon this provision by those who established such boards is shown in the agreement between the carriers and the train service brother-

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[1] Section 307 placed the same limitations upon resort to the Railroad Labor Board in cases not decided by use of the other machinery provided in the Act.

[2] 2 Railroad Labor Board 87, 96.

hoods creating the new Southwestern Regional Train Service Board of Adjustment in 1928. As in the case of the preceding boards, this agreement (pars. 4, 8 and 10) permitted the cases to be filed solely by the chief executives of the organizations and a corresponding carrier officer.[1]

The differences between the language used in the Railway Labor Act and that employed in the earlier orders and agreements are fully discussed in other briefs *amici* filed herein. We shall not enlarge that discussion. However, we do point out that the provisions of § 3 First (d) of the 1926 Act providing that any agreement establishing an adjustment board "Shall provide that parties may be heard in person," in the setting in which the language was used, obviously relate to the parties to the contract and not to the individuals whose claims are submitted to the board. This, at any rate, was the construction placed upon this provision by those who made use of the Act, as indicated above. And when the same language was incorporated in § 3 First (i) of the present Act the same construction was placed upon it by the First Division.

As to on the property grievance handling, "usual manner" under B. R. T. practice was explained to the House Committee by Vice President Doak of that organization—a member of the committee which drafted the bill—when the 1926 bill was under consideration, as follows:[2]

> "• • • First of all, if a man has a grievance he must submit it to his local lodge and get the majority of the members present at that meeting employed on the division or district where he is employed to sanction it before it can be taken up by his local committee. That is the first thing. Secondly, it is referred to the local committee, and they have a right to amend the grievance or handle it in any way they see fit and report back to the local lodge. The lodge can drop the case

[1] *Compilation*, pink pages 58, 59.

[2] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st Sess., p. 203.

> or it may be referred to the General Committee, which Committee consists of the Local Chairman from the respective divisions, who, with the officials of the railway, elect their own Chairman.
>
> It can be handled by that General Committee or thrown out as they see fit. Under this machinery, after it has gone through all this routine, the case can go to the General Manager, or the chief operating officer of the railroad, and with him conferences be held, and if the parties could not agree an appeal to the President may be made, if it is wanted, or to the highest officer of that railroad, before any of the machinery of this bill would be involved. Then if it was a grievance it would go to the Adjustment Board. * * * If it went to the Adjustment Board the decision of that Adjustment Board is final * * *."

This understanding of "usual manner" is corroborated by qualified observers and students of the industry.[1] It is obvious, of course, that this manner of handling was thoroughly understood by the carriers and organizations—which drafted the 1926 bill—and by Coordinator Eastman in 1934.

In summary, it is clear that the function of adjusting employee grievances with a carrier, except in the few instances where individuals undertook to handle their own claims on the properties, has been performed by labor organizations for more than a quarter of a century under governmental and statutory auspices. The machinery provided was geared to this type of handling; it could not have functioned in any other way. Such, we submit, was the established "usual manner of handling" of grievances when the decision of this Court was announced last term.

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[1] See Monograph 17, Railway Labor, of Attorney General's Committee on Administrative Procedure, p. 7 (reprinted in *Compilation*, p. 230). See also Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, *supra*, p. 577.

3. The effect of the Court's decision.

The impact of the Court's decision on the processes of grievance adjustment has already appeared in the suspension of the functioning of the National Railroad Adjustment Board and in indicated difficulties on various railroad properties. It is our conviction that unless this decision be reversed or substantially modified, the prompt and orderly settlement of such disputes will be impeded to a serious degree. The holding upsets long established techniques of grievance handling by employee representatives and adversely affects the administration and enforcement of the collective agreements.

We point out, first, that the Court's decision construes the Railway Labor Act in a way which frustrates the purposes which Congress had in mind in providing for the settlement of grievance disputes.

Congress itself announced its purposes in §2. It singled out the settlement of "all disputes growing out of grievances or out of interpretation or application of agreements" as an objective. And it stated that such settlements should be "prompt and orderly." In view of the importance of this segment of railroad labor relations to the uninterrupted operation of the carriers, it can hardly be doubted that this objective was within the constitutional power or that the means chosen were appropriate to the end sought. Compare *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 553. The congressional committees considering the 1934 amendments to the Act emphasized the importance of grievance settlements in this regard.[1]

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[1] "The most important change in the bill is the creation of what is termed the 'National Adjustment Board'." (Sen. Rep. No. 1065 on S. 3266, 73rd Cong., 2nd Sess., p. 1.)

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances' which develop from the interpretation and/or application of the contract between labor union and the carrier fix-

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Testimony had been received that strikes were threatened because of the accumulation of unadjusted grievances.[1] One of the principal aims of both the 1926 and 1934 bills was to secure more prompt and orderly settlements of such disputes which had piled up into serious proportions. The problem of employee dissatisfaction over unadjusted "log jams" of grievances is a continuing one, as Congress had good reason to know from long experience. We submit that the Act should be interpreted so as to lessen these dangers, not increase them; to facilitate, not hamper, the settlement of such disputes. This, we think, was the clear intent of Congress, as declared in the purposes of the Act and revealed by the circumstances surrounding its adoption.

The current problem of unadjusted grievances has essentially the same effect upon the functioning of the Act as did the situations previously presented to Congress. As we have pointed out, the adjustment of grievances is unavoidably a complex matter of large proportions. It is not too much to say that the resourcefulness of men and management has been taxed almost to the breaking point in an effort to handle the grievance load. And just as a procedure was being developed to lighten the load the

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ing wages and working conditions. * * * Many thousands of these disputes have been considered by Boards established under the Railway Labor Act, and the Boards have been unable to reach a majority decision and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an Emergency Board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service." (H. Rep. No. 1944, 73rd Cong., 2nd Sess., p. 2.)

[1] See testimony: Hearings before Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess., pp. 17, 33; Hearings before the corresponding House Committee on H. R. 7650, 73rd Cong., 2nd Sess., pp. 46-47, 81; Hearings before House Committee on H. R. 7180, 69th Cong., 1st Sess., p. 12.

Court's decision was found to be a barrier to further progress. The shutting down of the Adjustment Board because of the difficulty or the impossibility of securing authorizations is only one development of the decision. We are advised that some managements are insisting that local chairmen furnish powers of attorney in day to day adjustments. Considering the various factors involved, such as the volume of the grievances, the extra burden placed on the committees, and the additional delays which would be encountered, the task of compliance with the technique required by the Court's decision seems calculated to cause a breakdown of grievance handling by employee representatives. It is obvious that handling by individuals or on an individual basis will not work. Such a breakdown, or even the impairment of collective handling as traditionally practiced, will be serious, as prior history shows.

But we do not think that Congress intended its machinery to be applied that way. As pointed out, the Railway Labor Act was designed as an instrument of government for an industry which was largely self-governing. The statute was not to be legalistically construed. The 1926 Act was fashioned by men accustomed to the traditional processes of railroad labor negotiations who knew what would be practical in dealing with each other.[1]

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[1] Mr. Alfred P. Thom, speaking of the labor-management conferences which produced the 1926 bill, stated:

"And I wish to call attention to the fact that the conferences to which I have alluded were conferences of principals, not of their representatives. It was a conference not of lawyers but of the men who were charged on the side of the executives and on the side of the labor leaders with the duty of furnishing transportation to the American people, and who were practically in touch with the relations between the employees and the carriers, who had for years been dealing with that problem, and a *mere lawyer view of the question was with purpose kept out of the matter.* In fact, I may say at this point that when these principals got through and presented their work to Mr. Richberg and

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The 1934 Act did not depart from this atmosphere, although it did, of course, supply compulsions where needed and make clear the doctrine of majority rule among employees. We think Congress intended to preserve and continue what had been the "usual manner of handling" the settlement of such disputes and to approve the role played for so long by labor organizations in that function.

The instant case is a good example of how we believe Congress intended the Act to be applied. The record shows the accumulation of a docket of some 61 E. J. & E. cases, many of which were pending before the Adjustment Board. Among them were respondents' grievances. The agreement of October 31, 1938, disposed of those cases (R. 16-23). It secured relief to respondents in the application of the starting time rule. The Brotherhood then filed the second case with the Board to procure a complete decision on respondents' claims, and the entire docket was duly cleared.

Second, the decision impairs the functioning of employee representatives under the Act, and has an adverse effect upon the maintenance of craft agreements. Representatives of employees have the statutory right and duty (1) to confer with management respecting *all* disputes (§2 Second) and specifically those arising out of grievances or out of the interpretation or application of agreements (§2 Sixth); and (2) to represent a craft or class for the purposes of the Act (§2 Fourth). The latter, of course, includes the right to negotiate craft agreements. Em-

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to me I was told, and I do not doubt that he was told, that the lawyers must be good in this matter now; that here was what the principals wanted; that this was what they were willing to stand for; and *no legalistic view must be permitted to intrude for the purpose of destroying what the principals had done.*" (Emphasis supplied.) (Hearings before House Committee on H. R. 7180, 69th Cong., 1st Sess., p. 113.)

ployees, acting through representatives, have the right to make and maintain agreements and to settle *all* disputes (§2 Fourth, §1 First). These provisions, we believe, spell out collective bargaining rights with which the Court's decision interferes.

The majority opinion largely rests in differences found to exist between "major" and "minor" disputes and in their statutory treatment. The result is that whereas the majority representative is acknowledged to have exclusive control over the disposition of the former, individuals are given the final "say" over those of the second named class. Differentiation is made between collective bargaining and individual rights, and the prospective and retrospective nature of the two kinds of disputes. Such a construction of the Act, we believe, is unwarranted and has unfortunate consequences in the practical operation of the statutory plan.

It is commonly acknowledged that the settlement of and decisions upon grievances of the character involved here have an important bearing upon the administration of the collective agreement and the interests of the employees as a class.[1] Each decision upon a claim affects the fate

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[1] The Mediation Board has stated:

"After a craft or class of employees has established its right to have a collective-bargaining representative and this representative secures an agreement with the management respecting hours, wages, and working conditions, its next important function is to effect compliance with the terms of the agreement. * * * The function discharged by the Adjustment Board [and also that accomplished by on the property settlements] is necessary to the effective day to day observance of labor agreements, for if either party may violate the terms of such contracts with impunity, the agreements become meaningless. * * * (Sixth Annual Report, pp. 48-49).

The source materials on this subject are fully gathered in Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. R. 556 and in note 1 of the United States' brief herein.

of subsequent analogous claims.[1] Settlements made contrary to the "recognized interpretation" of the collective representative undercut the "maintaining" of the agreement. Improvident settlements have the same effect. Without the skilful and persistent protection of employee representatives the benefits of the contract to the craft would soon be frittered away in the unequal contest of individuals with management. As said by this Court in another connection "what was made collectively could be promptly unmade individually." *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U. S. 342, 346. Such, we submit, is the inevitable result if the degree of control over grievance settlements given to individuals by the Court is permitted to remain.

The weight attached by the majority to the distinction between bargaining for the past and the future appears to be unsupportable. The statute does not refer to this differentiation. We find no basis for its application in the conduct of grievance handling as practiced in the industry. For perhaps fifty years the Brotherhoods have been handling and settling grievances without reference to whether they related to the past or to the future.[2] In many

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[1] The National Railroad Adjustment Board has repeatedly recognized this fact. In the following illustrative decisions of the First Division, the awards were based upon the following findings:

Award No. 534. "The settlements made under the rules involved support the employees' contention."

Award No. 571. "Under settlements on this property claim is supported."

Award No. 837. "On the basis of previous settlements by the carrier in connection with the rule in question, the employees' contention in this particular case is supported."

Award No. 4992. "The prior settlements on this railroad, involving similar claims, warrant an affirmative award."

[2] This distinction likewise does not appear to have been recognized in the settlement of "major" disputes. Many wage agreements which have retroactive effect are reached through collective bargaining. As an example see the report of the Emergency Board appointed by the President May 31, 1943, pursuant to Executive Orders Nos. 9172 and 9299. Thus, collective bargaining is not always prospective.

situations, as the majority recognize, grievance disputes relate both to the past and to the future, as in the case at bar. In all instances, even though in varying degrees, their disposition is of concern to other members of the craft. Such claims may become part of an accumulation which only collective handling can adjust, as here. When they are sustained by the Adjustment Board collective bargaining is often necessary for their collection. To attempt to separate them into two classes, one to be handled individually and the other collectively, would only add confusion. In short, the distinction drawn by the Court, while falling into a convenient legal category, appears to be too technical[1] for application in the light of the situations presented and the effect it would have on long established practice.

Third, a large measure of relief from the frustrating effect of the Court's decision will be given if the statute be construed as conferring upon the craft representative authority to handle and settle grievance disputes of individual members of the craft and to submit them to the Adjustment Board, at least unless and until the individuals involved prior to settlement or disposition take seasonable measures to handle their individual grievances otherwise. There has been much discussion at bar over the issue of whether the statute confers upon the duly designated representative of a craft or class exclusive authority to handle grievance disputes for the members of such craft or class. We confine our attention to the question of whether individuals have the right under the Act to void the result of the action taken by the representative of their craft in settling their claims and submitting them to the Adjustment Board under the circumstances presented here. We believe they may not do so. This is because we consider that at

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[1] See footnote p. 25, *ante*.

least until notice is seasonably received from such employees of their desire to handle such grievances differently, the Act contemplates that the craft representative may perform these functions for them as part of the "usual manner" of handling. The argument in the brief of the United States as *amicus curiae* generally supports this position. It does not appear to require further development here.

CONCLUSION.

In the light of the matters herein discussed, we urge the Court to reverse or appropriately modify its holding that proof of authority from individual employees is required by the Railway Labor Act to empower the duly designated representative of the craft or class of such employees to settle the grievance disputes of such employees or to submit them to the National Railroad Adjustment Board, to the end that such representatives may handle such matters to a conclusion in accordance with the long established practice in the railroad industry.

Respectfully submitted,

RAY T. MILLER,
WAYLAND K. SULLIVAN,
HAROLD N. MCLAUGHLIN,
1708 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Brotherhood of Locomotive Engineers and Brotherhood of Railroad Trainmen, Amici Curiae.

DONALD W. HORNBECK,
W. A. ENDLE,
Of Counsel.

APPENDIX I.

Award No. 9231
Docket No. 13249

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

39 S. LaSalle St., Chicago 3, Illinois

The First Division consisted of the regular members and in addition Referee James H. Wolfe when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

WABASH RAILROAD COMPANY

Statement of Claim: Claim of Engineer T. P. Kane and Fireman F. H. Mueller, Decatur Division (11th District) for eight hours at yard rate of pay, account of performing switching at Keokuk, Iowa, in addition to other allowance for the trip May 19, 1940, and this and all other road crews required to perform switching at Keokuk, subsequent to May 19, 1940, be paid minimum yard day.

Employes' Statement of Facts: Engineer Kane and Fireman Mueller were called for train No. 3 at Bluffs, Ill. on May 19, Engine 576, for 8:30 A. M. reporting for duty at 8:10 A. M. departed Bluffs 9:35 A. M. Arrived Keokuk, Iowa, 1:40 P. M. Departed Keokuk on train No. 12 at 2:20 P. M. Arrived switch connection at Bluffs 6:40 P. M. round house 7:00 P. M. Off duty at 7:30 P. M., total time on duty 10 hours and 40 minutes. Upon arrival at Keokuk on May 19, Engineer Kane and his fireman were required to put away and make up their own train. Keokuk is the north terminus on the 11th District, the line between Bluffs and Keokuk. Trains Nos. 3 and 12 are mixed trains, crews assigned receive the local freight rate of pay, and operate on a turn around basis from Bluffs to Keokuk and return. Yard engines are maintained at Keokuk every

day in the week except Sunday. Yard engine crews put away No. 3 and make up No. 12 train on days that yard engines are working. May 19, being on Sunday, and no yard engines maintained, Engineer Kane and his fireman were required to perform switching that is usually done by yard crews. Made claim for an 8 hour day at yard rate of pay, in addition to other allowance for the trip which was declined.

Position of Employes: The claim of Engineer Kane and Fireman Mueller is based on Paragraph C, Article 3, Paragraph B, Article 7, Paragraph A, Article 21, Schedule Lines West of Detroit reading:

"ARTICLE 3

(C) 100 miles or less, 8 hours or less (straight-away or turn-around) shall constitute a day's work in all local or way freight service; miles in excess of 100 to be paid for at mileage rates provided; overtime to begin when the time on duty exceeds the miles run divided by 12½. Overtime shall be paid for on the minute basis at an hourly rate of three-sixteenths of the daily rate, according to class of engine or other power used."

"ARTICLE 7

(B) Eight hours or less shall constitute a day's work."

"ARTICLE 21

(A) Road and helper enginemen in freight service will not be required to do switching at their initial or final terminal where switch engines are located. Doubling trains from one track to another, set out bad order or no-bill cars, will not be considered switching unless time consumed is more than 30 minutes, in which case it will be paid for at overtime pro rata rate, with a minimum of one hour."

The Committee also desires to call the Board's attention to N. R. A. B. First Division, Award No. 3633, which further supports the claim.

This case has been handled in conformity with the Railway Labor Act as amended and is hereby being transmitted to your Board for hearing and decision.

Oral hearing is not requested unless done so by the carrier.

Carrier's Statement of Facts: With reference to that part of the Committee's ex parte statement of claim reading as follows:

> "• • • and all other road crews required to perform switching at Keokuk, subsequent to May 19, 1940, be paid minimum yard day."

No claims of the same character (as the alleged claim of Engineer T. P. Kane and Fireman F. H. Mueller on May 19, 1940) for Engineer T. P. Kane and Fireman F. H. Mueller on subsequent dates, or for other Decatur Division engineers and firemen on subsequent dates, have been handled with the Carrier and submitted to the National Railroad Adjustment Board in accordance with the provisions of the Railway Labor Act as amended June 21, 1934, and, therefore, such claims are not properly before or subject to a decision by the Board, and, accordingly, the only claim before the Board is the alleged claim of Engineer T. P. Kane and Fireman F. H. Mueller "for 8 hours at yard rates of pay, account of performing switching at Keokuk, Iowa, in addition to other allowance for the trip May 19, 1940."

Subject to and without waiving the foregoing objections, the Carrier makes the following statement on the merits of the alleged claim of Engineer T. P. Kane and Fireman F. H. Mueller for 8 hours at yard rates of pay on May 19, 1940.

Engineer Kane and Fireman Mueller were assigned on the engineers' and firemen's extra board, and on the date in question were filling temporary vacancy as engineer and fireman on Trains Nos. 3 and 12 operating daily in turn-around local freight service on the Keokuk Branch

from Bluffs, Illinois to Keokuk, Iowa and return, distance 77 miles in each direction, with home terminal at Bluffs.

Trains Nos. 3 and 12 were scheduled to operate as follows:

Train No. 3

Leave Bluffs 8:15 A. M.—Arrive Keokuk 1:30 P. M.

Train No. 12

Leave Keokuk 2:30 P. M.—Arrived Bluffs 6:50 P. M.

Yard assignments are not and never have been maintained by this carrier at Keokuk, however, at the time of this claim, and for several years prior thereto, the Rock Island Railroad operated one yard engine at Keokuk which was assigned to work from 10:30 A. M. to 6:30 P. M. daily, except Sunday, and under this arrangement the Wabash switching at Keokuk, including service incidental to and in connection with putting train No. 3 away on arrival and making up train No. 12 prior to departure, was performed by the Rock Island yard crew 6 days per week from Monday to Saturday, both inclusive. On Sunday the road crew assigned to trains Nos. 3 and 12 between Bluffs and Keokuk and return were required to put away their own train on arrival at Keokuk and make up their train prior to departure from that point.

On May 19, 1940, which was Sunday, Engineer Kane and Fireman Mueller reported for duty on Train No. 3 at Bluffs at 8:10 A. M., and arrived at Keokuk at 1:40 P. M. with 11 cars, all of which were set out on the bluff track regularly used for setting out cars arriving at Keokuk in this train. Prior to departure from Keokuk on Train No. 12 the road crew were required to make up their own train, which consisted of picking up 8 cars standing on two parallel tracks, i.e., 4 on the Cooper track and 4 on the C. B. & Q. transfer track, which were doubled on to the caboose of Train No. 12. Train No. 12 departed from Keokuk at 3:05 P. M. and arrived at Bluffs where the

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engine crew were relieved from duty at 7:20 P. M., total time on duty 11 hours and 10 minutes.

For the service performed on this trip Engineer Kane and Fireman Mueller submitted one time report claiming 154 miles at local freight rates, and submitted a supplemental time report claiming an additional day at yard rates for service performed at Keokuk from 1:40 P. M. to 2:10 P. M. putting away Train No. 3 and making up Train No. 12. Engineer Kane and Fireman Mueller were allowed 154 miles at local freight rates, or continuous time from the time they were required to report for duty at Bluffs at 8:10 A. M. to the time they returned to that point and were relieved from duty at 7:20 P. M., as they were in branch line turn-around local freight service, and, accordingly, were subject to the provisions of the agreement covering rates of pay, rules and working conditions for engineers and firemen in that class of service.

Article 3, Paragraphs (A), (B) and (C) of the Schedule for Engineers and Firemen reads as follows:

> "(A) For local or way freight service, 52 cents per 100 miles or less for engineers and 40 cents per 100 miles or less for firemen shall be added to the through freight rates, according to the class of engine; miles over 100 to be paid for at the mileage rates provided."
>
> "(B) The local rates where now applied on branch runs will be as stipulated in Paragraph 'A.'"
>
> "(C) 100 miles or less, 8 hours or less (straight-away or turn-around) shall constitute a day's work in all local or way freight service; miles in excess of 100 to be paid for at mileage rates provided; overtime to begin when the time on duty exceeds the miles run divided by 12½. Overtime shall be paid for on the minute basis at an hourly rate of three-sixteenths of the daily rate, according to class of engine or other power used."

Article 21 of that agreement reads as follows:

> "(A) Road and helper enginemen in freight service will not be required to do switching at their initial

or final terminal where switch engines are located. Doubling trains from one track to another, set out bad order or no-bill cars, will not be considered switching unless time consumed is more than 30 minutes, in which case it will be paid for at overtime pro rata rate, with a minimum of one hour.

INTERPRETATION:

It is the intent of this paragraph that any switching other than the exceptions made, will be paid for with a minimum of one hour at pro rata rate. Switching done as per Paragraph 'A' will be counted in the accumulative time as per Article 2, Paragraph 'U,' providing time consumed is less than 30 minutes.

(B) Enginemen required to do switching at terminal station where no switch engine is maintained or available, will be paid for such service at overtime pro rata rate on a minute basis with a minimum of one hour. This is not intended to apply to local freight or branch train runs required to do their own station switching or to make up or put away their own trains. Terminals are points where the runs begin and end. The turning point on a turn-around run shall be considered as an intermediate point on a continuous run."

Article 40, Paragraph (A) of that agreement reads as follows:

"(A) Excepting payments under rules applying to work performed at initial and final terminals, and to final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.

On roads where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended."

and Article 27, Paragraph (A) of that agreement reads as follows:

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"(A) Time of road enginemen will begin not less than 20 minutes prior to the time for which they are called and will end 20 minutes after placing engine on designated track, when engine crew will be considered released."

Position of Carrier: The alleged claim of Engineer Kane and Fireman Mueller for 8 hours at yard rates of pay account of putting away and making up their train at Keokuk on May 19, 1940 is without foundation under the rules of the Schedule for Engineers and Firemen, Lines West of Detroit and Toledo, effective December 1, 1919.

As shown by the Carrier's Statement of Facts, Engineer Kane and Fireman Mueller were in turn-around local freight service operating on the Keokuk Branch from Bluffs to Keokuk and return to Bluffs, and while in that service were subject to the provisions of the schedule applicable to engineers and firemen in turn-around local freight service.

Article 21, Paragraph (A) contains no provision for the allowance of 8 hours at yard rates to engineers and firemen under any circumstances. That rule provides—

1. that enginemen in freight service will not be required to do switching at their **initial or final terminal** where switch engines are located; and

2. that when engineers and firemen perform more than 30 minutes switching at such terminals they will be paid therefor at pro rata rate, with a minimum of one hour.

In view of the fact that Keokuk, the point where the service in question was performed, was neither the initial nor the final terminal, but was the turning (intermediate) point on the run, it is obvious that the provisions of Article 21, Paragraph (A) do not support the contention of the Committee in the case under consideration. In that connection, attention of the Board is also invited to that part of Article 21, Paragraph (B), previously quoted, reading as follows:

"Terminals are points where the runs begin and end. The turning point on a turn-around run shall be considered as an intermediate point on a continuous run."

In addition to the fact that Article 21 only provides for additional compensation (but under no circumstances a day at yard rates) to engineers and firemen when required to perform switching at **terminals**, and in the case under consideration Keokuk was, under the specific language of Article 21, Paragraph (B), an **intermediate point** on a continuous run, attention is invited to the following language also contained in that rule:

"This is not intended to apply to local freight or branch train runs required to do their own station switching or to make up or put away their own trains."

As previously stated, engineers and firemen in road service are subject to the rules of the schedule applicable to engineers and firemen in that class of service, and when required to perform service at intermediate points, as was done in the case under consideration, they are not, under those rules of the schedule, entitled to additional compensation, as such allowance would conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip, as provided by Article 40, Paragraph (A) of the schedule, quoted in Carrier's Statement of Facts.

Attention of the Board is invited to Decisions Nos. 120, 618, 619 and 784 of the Southwestern Regional Train Service Board of Adjustment, wherein it will be noted that claims were not presented for road crews account of being required to perform switching at the point involved in those decisions, which is conclusive evidence that it was understood by the parties that road freight crews are not entitled to additional compensation for service performed under the circumstances existing in the case under consideration where all service performed by the road crew at Keokuk was in connection with their own train, i.e., setting out their cars on arrival and picking up their cars prior to departure.

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The foregoing conclusively shows that—

1. The alleged claim of Engineer Kane and Fireman Mueller for 8 hours at yard rates on May 19, 1940 is without foundation under the rules of the Schedule for Engineers and Firemen;

2. Keokuk was an intermediate point for the turn-around local freight run on which Engineer Kane and Fireman Mueller performed service on the date in question, and the rules of the Schedule for Engineers and Firemen do not provide for any additional compensation to engineers and firemen in road service when required to perform switching at intermediate points;

3. Yard engines are not and never have been maintained by this carrier at Keokuk, however, as previously stated, at the time of this claim and for several years prior thereto, the Rock Island Railroad operated one yard engine which was assigned to work from 10:30 A. M. to 6:30 P. M., daily, except Sunday, and on May 19, 1940, which was Sunday, the Rock Island yard engine was not assigned to work;

4. All service performed at Keokuk by Engineer Kane and Fireman Mueller on May 19, 1940 was in connection with their own train;

5. The principle involved in this alleged dispute was definitely and finally disposed of in previous decisions of the Southwestern Regional Train Service Board of Adjustment, at which time it was recognized by the employes that road crews were not entitled to any additional compensation under the circumstances existing in the case under consideration;

6. The alleged claim referred to herein could only be sustained by a complete disregard of—

(a) a binding agreement between the carrier and its employes represented by the Brotherhood of Locomotive Engineers, and the Brotherhood of Locomotive Firemen and Enginemen;

(b) binding decisions of the Southwestern Regional Train Service Board of Adjustment which definitely and finally disposed of the principle involved in this alleged dispute;

(c) the sanctity of the agreement between the carrier and its employes;

(d) the fact that the National Railroad Adjustment Board has no legal right to impose on the parties or on either party new rules;

(e) Section 6 of the Railway Labor Act as amended June 21, 1934.

In view of the above facts it is obvious that the contention of the Committee should be dismissed and the alleged claim denied.

The carrier affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made a part of the particular question in dispute.

Oral hearing is requested.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived hearing thereon.

Keokuk is the turnaround point for engine crews manning trains No. 12 and No. 3 and, by Rule 21 (B) Enginemen's Schedule, an intermediate point. At this point the Rock Island Railroad operated one yard engine which did one trick daily except Sunday and under arrangement with the Wabash the switching at Keokuk, including making up and putting away of trains No. 12 and No. 3 respectively was done on all days except Sunday. On May 19, 1940, a

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Sunday when no switching crew was on duty, enginemen on turnaround run put away their own train No. 3 on arrival and made up their own train No. 12 prior to departure, for which they claim a yard day. In Award 3110 it was said "In scores of cases * * * this Division has held that yard work **as to which seniority is held by yardmen** cannot be taken away from them and turned over to roadmen to perform. Whether it be so expressly stipulated in the Schedule or not, is not controlling **as such would necessarily be implied if not expressed** since work is the very subject matter of the contract with the yardmen, and to hold it to be the prerogative of one party to the contract to destroy the subject matter of it would be to hold that no contract exists." (Emphasis added.) In Award 7192 it was stated: "The rulings which give roadmen the right to collect for yard work even though the intrusion is slight stems from the principle of seniority. The preference right of men in a craft [or class] to do the work of that craft [or class] according to the length of service results in the corollary that all men of that craft may exclude outsiders having no rights of seniority from positions in the field in which the craft [or class] operates, and this principle has apparently been extended to prevent roadmen from not only taking yard positions when they hold seniority, but from doing for the most part any work which is yardmen's work." It is a fair intendment from the record that the Rock Island yardmen held seniority at Keokuk. This was an encroachment by the Wabash enginemen on the seniority rights of these Rock Island yardmen.

It is contended, however, that this is not a yardman's claim and that since enginemen on the Wabash have Division seniority covering the entire division, there is no encroachment on rights of Wabash yardmen because no Wabash yardmen were employed. But the principle enunciated in Award 7192 and numerous other awards prior and subsequent thereto does not apply only to the members

of another craft belonging to the same railroad but extends to a case where an employe of one railroad is required by order to encroach on the occupational domains of another craft or class which has, through contract with another railroad, carved out that work for itself. In Award 4923 this Board speaking through a Referee, denied an award where the road crew of one line was required to do switching on a foreign line, saying: "it cannot be said that yardmen of the carrier (the carrier against which the award was sought) were deprived of any work by requiring road crews to do the switching involved." In that Docket 7195 the owner carrier did the switching for the tenant carrier, while in this case the Rock Island did the switching for the Wabash. But it is submitted that the Referee in Award 4923 ran counter to the principle which he had, through many awards, helped to establish. And this principle thoroughly established throughout the whole railroad industry remains the same whether, as was said in Award 3633, the payment exacted is compensation for a service performed by employes who did not contract to do it but were required to do it or whether, as was said in Awards 7231 to 7239, that it has both the aspect of compensation or a penalty—compensation as far as the employe doing it is concerned—and a penalty imposed on the carrier as a deterrent from not repeating the violation. A penalty is punitive, not compensatory. Whether the payment is exacted by way of compensation for work done or by way of a penalty or both, it is now thoroughly established in the industry that where yardmen contract for the work, they alone are entitled to perform it.

The claim is for "this and all other road crews required to perform switching at Keokuk subsequent to May 19, 1940."

The carrier contends that "no claims of the same character" have been processed on the property and hence that such claims "are not properly before or subject to a decision by the Board."

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Section 3 (i) of the Amended Railway Labor Act provides: "The **disputes** * * * growing out of grievances or out of the interpretation or application of agreements * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such dispute; * * *." (Emphasis added.) It will be noted that the act does not specify that each claim shall be handled in the usual manner. Many claims affecting many different claimants may reflect one dispute growing out of a single grievance or out of the same difference of opinion as to the interpretation or application of certain rules. A dispute arises by virtue of a difference of opinion as to the applicability or interpretation of certain rules as related to a certain fact situation. Where certain named claimants make claims under a definite fact situation for certain named dates there is of course no difficulty. It is thought that there should be no difficulty where the same named parties alleged that on subsequent but unnamed dates exactly similar violations were committed **as to them** because there was a repetition of the identical fact situation which it is claimed constituted the violations. When the claim includes a demand for reparations for unnamed claimants at subsequent unnamed times, the case becomes more doubtful because of the uncertainty that the fact situations regarding all the unnamed parties are the same and hence whether they involve the **same** dispute which the carrier has the right under Section 3 (i) of the Railway Labor Act to have handled on the property. When the carrier objects for the reason that the instances sought to be included in the claim are such that, on examination, show variations in the factual situation which may take them out of the bounds of the particular dispute presented, it would seem that the carrier should have the right to have those fact situations presented to it in order to determine whether they involve the same dispute. But where it is apparent that the fact situation was such that it could involve only the single dis-

pute in issue, there would seem to be no reason why parties and dates easily ascertained should not be included. A good example is Board Award 2871 where there could have been no question but that all the parties on the third trick were started 59 minutes too late on the rule for continuous shifts. The Board in many cases seems to have consciously or unconsciously followed this differentiation in certain of the awards. Thus in Board Awards 6725, 6748 and Referee Awards 2145, 2707, 3040, 3320, 3828, 5423, 6627, the situations were such as not to involve a mere repetition of exactly the same fact situation although some of them would seem to very nearly approach such case. In Referee Award 5191, involving pay for lunch periods, a class recovery was disallowed although it would seem that the unnamed parties at each subsequent time would fit exactly the same fact mold. In Board Awards 2517, 2521, 2871, 3385, 5921, 6799, apparently unnamed parties who fell in the class affected were permitted to recover. Here again in Awards 2521, 2871, 3385 and 6799, the identical acts or omissions alleged to constitute the infractions affected every one in a group or the act or omission although not affecting all equally in a group were simple and uncomplicated and were identical as they affected successive individuals. That, however, is not so apparent as to the fact situations involved in Award 2517. It, therefore, cannot be said that the line of demarcation between those Board and Referee Awards which allowed and those which disallowed unnamed parties to recover for infractions alleged to have occurred at unnamed subsequent dates was altogether along the line of whether the fact situations were such as to constitute identical repetitions (in which case the award would take on the aspect of an interpretation) or so similar as to amount to an identical repetition of the same transaction or whether the fact situations attempted to be encompassed under the same dispute may have varied sufficiently to embrace new facts which might have given rise to another dispute or perhaps, if

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accurately known, might involve no dispute at all. Certainly where new facts were added to the claim as submitted to the Division which would make a new dispute not handled on the property or where it is likely that claims for unnamed parties may not be based on identical or closely similar fact situations so that the carrier should have been permitted to pass on them, the Awards properly held it down to the situation as presented on the property. See Awards 3385—3212, 4007 (allowed only from date the particular ground on which award was based was brought to the attention of the carrier), 4519-5668-6964.

The upshot of the whole matter is therefore that when it is clear that claims of unnamed individuals although for even and subsequent dates are based on fact situations identical with that of the named claimant so as to definitely apprise the carrier that they are within the confines of the particular dispute reflected by the claim, there is no reason why claims involving the same dispute should be multiplied in the field or before this Board. Economy of effort and time and filing space both in the field and in this Division demand otherwise. But if the situation is such that it cannot be clearly discerned that the factual basis of the claims of the unnamed parties fall within the dispute raised by the claim of the named parties so that the carrier may know that he is giving his decision on one definite question, this Division, especially on objection of the carrier, should confine its findings to the instances where it is convinced that the factual basis of all claims passed upon gives rise to the same dispute and the carrier was apprised of it.

The fair intendment of the claim filed in this case asking that "this and all other road crews required to perform switching at Keokuk subsequent to May 19, 1940, be paid minimum yard day" was to cover only situations where the road crews did the work of putting away and making up their own trains on Sundays when the Rock Island yard crew was not on duty. The carrier shall check for all such

instances respecting Wabash engine crews after May 19, 1940, and make payment accordingly.

AWARD

Claim sustained per Findings.

By Order of First Division
National Railroad Adjustment Board
Attest: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 6th day of April, 1944.